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No. 86-179, 86-401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, et al.,
Appellants,

THE UNITED STATES OF AMERICA,
Intervenor,

v.

CHRISTINE AMOS, et al.,
Appellees.

On Appeal From The United States District Court For The District Of Utah

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BRIEF *AMICUS CURIAE* OF CONCERNED WOMEN FOR AMERICA IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS

Concerned Women for America is a national, nonprofit womens' organization of over 560,000 members. CWA works through lobbying and litigation to promote religious liberty and traditional moral values in American law and government. CWA attorneys have appeared

before this Court, see *Larry Witters* v. *Washington Department of Services for the Blind*, 474 U.S. ___, 88 L.Ed.2d 846 (1986).

At its first annual convention in September, 1984, the members of Concerned Women for America passed the following resolution:

> II. We believe that our nation's heritage of religious freedom must be vigorously maintained as the prime foundation for all of our liberties. The ever growing threat of government intervention in the affairs of churches, their schools, and the religious liberties of families must be forcefully opposed.

The members of Concerned Women for America view discrimination lawsuits against religious organizations as a growing threat to religious freedom and a subtle, yet significant breach of the wall of separation between church and state. Lawsuits like this one strip religious groups of their constitutional authority to decide whom they will hire, and give government an excuse to impose and entangle itself in the affairs of religious organizations.

The facts in this case at bar possibly could obscure these threats to religious liberties. Some may say that there is nothing "religious" about working as a janitor at a Mormon Church-run physical fitness center, or making special Mormon temple clothing at a church-run factory. Some people might find it petty, trivial, or outrageous for the Mormon Church to require that all its employees at the Deseret fitness facility and the Beehive Clothing Mills to be qualified for Temple recommends.[1] But these surface

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[1] The temple recommend signifies that its possessor is eligible to enter the Church's temples, where certain sacred ceremonies are performed. Since temple recommends are issued only to members who observe Mormon Church religious standards, they afford an administratively convenient way of identifying those who qualify for Church employment. See Jurisdictional Statement at 4, footnote 2.

facts should not be allowed to mask the critical religious liberty issues at stake here.

Concerned Women for America urges this Court to see that once the courts take jurisdiction of discrimination suits against religious groups, the courts embark on a road that will lead to a myriad of mirey entanglements in church-state questions. Ultimately, the federal courts may find themselves wrestling, as Br'er Fox did, with these tar-baby-type questions:

1. Can a Jewish synagogue refuse to hire for a janitor position a member of a white supremicist church, such as Aryan Nations or the Church of Jesus Christ, Christian?

2. Can a Jehovah Witness Church refuse to hire a non-Jehovah Witness as a secretary to the pastor?

3. Can a fundamentalist church refuse to hire a homosexual to drive a bus for its Christian private school?

4. Can a woman sue the Roman Catholic Church for sex discrimination because it does not employ women as priests?

5. Can the Internal Revenue Service revoke the Roman Catholic Church's tax exempt status, because its men-only priest theology violates public policy?

Concerned Women for America urges this Court to see the looming "backdoor threat" posed by these discrimination suits directed against religious groups. This nation's commitment to equal opportunity to all will not erode because the courts uphold the constitutional power of religious organizations to determine whom they will employ. People who decide to associate together because of common religious beliefs should be free to hire whom they want for jobs within the religious organization.

I.

THIS COURT SHOULD AFFIRM THE CONSTITUTIONALITY OF THE RELIGIOUS EXEMPTION IN 42 U.S.C. 2000E-1 (SECTION 702)

The federal court in this case, and other cases have shied away from totally upholding the constitutionality of the exemption Congress gave to religious organizations in Section 702, later codified as 42 U.S.C. 2000e-1. This section reads:

> This subchapter shall not apply to an employer with respect to the employment of aliens outside any state, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

Other federal courts have tried to limit the exemption, by saying that it applies only to a religious group's leadership or teaching positions, and not to any others.[2] The district court in this case also limited the scope of Section 702 in this manner.

This skewed analysis knocks the wind out of constitutional guarantees of religious freedom and government separation from the church. The court below, and other courts, allow civil rights agencies to oversee the practices of religious organizations, to ensure that they do not

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[2] See *McClure* v. *The Salvation Army*, 460 F.2d 553 (5th Cir. 1972), *EEOC* v. *Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *EEOC* v. *Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981), *EEOC* v. *Pacific Press Publishing Association*, 676 F.2d 1272 (9th Cir. 1982), and *Rayburn* v. *Gen. Conf. of Seventh-Day Adventists*, 676 F.2d 1272 (4th Cir. 1985). See also *Feldstein* v. *Christian Science Monitor*, 555 F.Supp. 974 (D.Mass. 1983).

violate laws on equal opportunity. Such practices by government agencies intrude on a religious group's free exercise rights, and creates myriad Establishment Clause problems by regulation and investigation of religious practices.

Congress wisely eliminated those significant constitutional problems by exempting religious group hiring practices from the sweep of the Civil Rights Act of 1964, as far as basing hiring decision on religion. By passing Section 702, Congress merely accommodates the constitutional rights of religious organizations for free exercise of their beliefs, without government interference and meddling.

A. Section 702 Reflects The Government's "Duty To Accommodate" Religious Beliefs And Practices

This Court, in at least six decisions, has ruled that government accommodation of religion does not violate the Establishment Clause. When Congress passed Section 702, it merely accommodated the religious-based employment practices of religious groups from government regulation. Congress had no intention of promoting sectarian beliefs, but was merely keeping government regulators out of the church realm.

The court below ignored this strong line of precedents, and ruled that the Section 702 religious exemption impermissibly promotes religion, because it treats religious groups differently than other employers. The lower court's stilted, wooden analysis did not even address the line of decisions by this Court that state conclusively that government accommodation of religion *does not* violate the Constitution.

A quick review of the relevant decisions of this Court shows a strong support for government accommodation of

religious practices. In *Sherbert* v. *Verner*, 374 U.S. 398 (1963), South Carolina defended its denial of unemployment benefits to a Seventh Day Adventist woman, by saying that paying her when she lost her job for not working on her Saturday sabbath, would show government endorsement of her religious belief, in violation of the Establishment Clause. This Court explicitly rejected that argument

> In holding as we do, plainly we are not fostering the 'establishment' of the Seventh Day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the government obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which is the object of the Establishment Clause to forestall.

374 U.S., at 409

In the similar case of *Thomas* v. *Review Bd.*, 450 U.S. 707 (1981), this Court rejected the claim by Indiana that it must deny unemployment benefits to a pacifist Jehovah's Witness who refused to work on tank turrets at a truck factory, because paying the benefits would show government support of his religion. This Court rejected on an 8-1 vote the argument by Indiana that accommodation of religion violates the Establishment Clause. See 450 U.S. at 719-20.

In *Widmar* v. *Vincent*, 454 U.S. 263 (1981), the University of Missouri-Kansas City argued to this Court that the Establishment Clause compelled it to prohibit student-led religious meetings on campus, but not other student-led meetings. This Court rejected that reasoning, saying that government accommodation of student-led religious

groups does not imply government sponsorship of religion. This Court said,

> An open forum in a public university does not confer any imprimatur of state approval on religious sects or practices.

454 U.S., at 274

In *McDaniel* v. *Paty*, 435 U.S. 618 (1978), this Court struck down a Tennessee state constitutional provision that prohibited ministers from serving in the Legislature. Tennessee defended the constitutional provision by saying it was required by the federal Establishment Clause to keep ministers out of the Legislature. Justice William Brennan, in his concurring opinion, said,

> The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here; (citations omitted). It may not be used as a sword to justify repression of religion or its adherence from any aspect of public life.

435 U.S., at 641

Justice Brennan also said,

> The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore, subject to unique disabilities.

Id.

In *Zorach* v. *Clausen*, 343 U.S. 306 (1952), this Court upheld a time release program at a public school, which allowed children to leave the public schools for religious instruction. This Court again rejected the concept that

state accommodation of religious practices of the community's families violates the Establishment Clause:

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respect the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show callous indifference to religious groups.

343 U.S., at 313-14

This Court has not only said that government accommodation of religion is permissible, it has said that the Constitution mandates a duty to accommodate religious beliefs and practices. In *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), this Court said,

> [The First Amendment] affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.

465 U.S., at 673

The principle articulated in this line of cases applies to the case now before the Court. Congress has a duty to accommodate the religious beliefs of groups who believe that all employees of their endeavors must share their religion. Section 702 merely accommodates that belief by religious groups, and limits the exemption to the confines of the religious organization itself.

Danger lurks in treating religious organizations "equally" by requiring nondiscrimination in the area of religion-based hiring. Such a ruling would trample their constitutional rights guaranteed by the Free Exercise Clause. In order to protect a group's religious beliefs, the

law must treat them differently, or else the law swallows up their First Amendment freedoms.

B. Narrowing Section 702 Will Create Excessive Entanglement Of Courts With Religious Bodies, In Violation Of The Constitution.

The district court applied the tripartite Establishment Clause test spelled out by this Court in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). The district court found that Section 702 violated the "primary effect" part of the *Lemon* test, because it allows religious groups to make religious-based employment decisions, that other employers cannot do under the law. This brief shows in the previous section, government accommodation of religion does not have the "primary effect" of promoting religion. In fact, government has a "duty to accommodate" religious beliefs and practices, *Lynch*, *supra*.

Instead of focusing on the second prong of the *Lemon* test ("primary effect"), as the district court did, this Court should focus on the third part of the test, the excessive entanglement portion. If this Court upholds the district court's opinion, it will create a significant excessive entanglement problem, because courts will have to parse and analyze religious beliefs, and their importance to a church's hiring decisions and practices.

The lower court erroneously examined the controversy in terms of whether the Deseret and Beehive jobs were secular or religious. This improper analysis raised the excessive entanglement problems. The court had to ask, "how important is it in Mormon theology for all employees of a church-run facility to be qualified for temple recommends?" The court must then determine how important the Mormon beliefs are to the Mormons. That engulfs the

judiciary in a morass of sticky theological questions where judges do not constitutionally belong.

In the case at bar, the district court had to study Mormon Church doctrines and practices, and how they relate to the specific employment circumstances in this case. Then, the court had to judge how important these doctrines and practices are to the Mormon Church, in relation to the facts.

Under the First Amendment, the courts should not scrutinize the hiring criteria of churches. A federal district judge in Wisconsin was recently faced with a similar case, in a lawsuit brought by a woman denied a professorship in theology at Jesuit-run Marquette University in Milwaukee. In *Maguire* v. *Marquette University*, 627 F.Supp. 1499 (E.D. Wis. 1986), the judge wrote that he was essentially being asked by the plaintiff to decide whether she is a good Catholic or not, and suitable for a professorship. The judge refused to do so:

> Such an inquiry would require the Court to immerse itself . . . into definitions of what it is to be a Catholic. That question is one of the First Amendment leaves to theology departments and church officials, not federal judges.

627 F.Supp., at 1499

This Court should see this case as an opportunity to uphold the separation of church and state, by getting federal judges out of the business of examining church doctrines, and how they relate to church hiring practices.

This Court recently had a taste of those type of entanglement problems in *Ohio Civil Rights Commission* v. *Dayton Christian Schools*, ___ U.S. ___, 106 S.Ct. 2718 (1986). This Court could see the looming Establishment Clause quagmire if courts are allowed to examine

religious practices and doctrines in order to eliminate perceived employment discrimination. Although this Court disposed of *Dayton Christian Schools* on procedural grounds, the constitutional problems remain in the facts. Specifically, government investigation and enforcement of civil rights laws against religious organizations snares the government into intimate involvement with religious affairs. Inevitably, courts must make value judgments about the relative importances of religious beliefs, as applied to specific religious group occupations. This is not permitted under the Constitution.

Concerned Women for America understands and supports this nation's commitment to equal opportunity for all. But this nation also has a constitutional commitment to religious freedom and separation of church and state. The federal courts have been wrong to limit the scope of Section 702. The judicially-constructed limitations of this section do not eliminate an Establishment Clause violation, but restrict Free Exercise protections. This Court should protect religious groups from any unrestrained zeal by courts or administrative agencies to punish religious groups for "discrimination." In reality, such actions transgress First Amendment freedoms, and subdue churches under government oversight of their hiring policies.

This nation's commitment to equality will not erode because religious groups can refuse to hire people not meeting their religious standards. If this segment of society retains its powers under Section 702, it will not unleash a torrent of discrimination in society. Indeed, it may foster more respect for religious liberties.

This Court has oft used the phrase, "separation of church and state," to describe the substance of the Estab-

lishment Clause and the Free Exercise Clause. This Court has vigorously enforced this constitutional principle to keep the church out of the state. To mix a metaphor, the wall of separation is a two way street. State involvement in church affairs is just as prohibited as church control of the state. The government should not impose its public policy values of hiring criteria on religious groups.

CONCLUSION

This Court has in the past recognized the dangers of government entanglement with religion, which arise from court determinations of adherence to church doctrine and belief (see, e.g., *Presbyterian Church* v. *Hull Church*, 393 U.S. 440 (1969). The Establishment Clause and the Free Exercise Clause protect religious organizations from government interference. This Court should not abandon those principles in this case.

Date: December 19, 1986

Respectfully submitted,

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